Case Nos. 28-CA-13274 and 28-CA-13275

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

HACIENDA RESORT HOTEL AND CASINO and
SAHARA HOTEL AND CASINO

Respondents,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226 and
BARTENDERS UNION LOCAL 165

Charging Party.

On Remand from the U.S. Court of Appeals for the Ninth Circuit

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POSITION STATEMENT OF CHARGING PARTY LOCAL JOINT EXECUTIVE BOARD, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION LOCAL 165

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A. Background

This will be the fourth time that the Board has considered this case on remand from the Ninth Circuit.[1] In its third decision in this matter, the Ninth Circuit concluded that the Respondents Hacienda Resort Hotel and Casino and Sahara Hotel and Casino (the "Hotels") violated Section 8(a)(1) and (5) of the Act when they ceased dues-checkoff without first bargaining to impasse. *See Local Joint Executive Board of Las Vegas v. NLRB* ("*LJEB III*"), 657 F.3d 865 (9th Cir. 2011). Specifically, the Court held that where "dues-checkoff provisions do not implement union security . . . but instead exist as a free-standing, independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force." *Id.* at 875. The Court vacated the Board's decision in *Hacienda III* and remanded the case to the Board for the purpose of determining appropriate relief. *Id.* at 876.

In 2015, the Board issued a decision in which the Board declined to award Petitioner Local Joint Executive Board (the "Union"), the charging party in the case, the standard make-whole remedy. *Hacienda Resort Hotel and Casino* (*"Hacienda IV"*), 363 N.L.R.B. No. 7 (2015). Instead, the Board issued only injunctive relief and a notice posting, even though the Hotels ceased doing business over twenty years ago. *Id.* at 3-4; *Hacienda Resort Hotel and Casino* (*"Hacienda I"*), 331 N.L.R.B. 665, 672 (2000) (explaining the sales history of the Hotels). The Union asked for reconsideration and appealed the decision. After argument, the Ninth Circuit ruled that the Board had abused its discretion by declining to issue the standard make-whole

[1] The Union has briefed this case to the Board at least five times before. To avoid undue repetition, it hereby incorporates by reference its Exceptions to Decision of the Administrative Law Judge and Supporting Brief, filed September 24, 1996; its Position Statement on the first remand, dated May 13, 2003; its Position Statement on the second remand, dated January 12, 2009; its Position Statement on the Third remand, dated January 12, 2009; and its Motion for Reconsideration, dated June 10, 2012.

remedy in this case. *Local Joint Executive Board of Las Vegas v. NLRB* (*"LJEB IV"*), slip op. at pp. 5, 20 (2018). The Court vacated *Hacienda IV* and remanded the case to the Board with instructions. *Id* at p. 20. The Board accepted the remand from the Court. (NLRB ltr. to Counsel, dated May 11, 2018.)

B. The Board Has Accepted the Court's Order to Issue Make-Whole Relief.

The Board's request for statements of position was limited to the issues raised in the Court's remand. (NLRB ltr. to Counsel at p. 1, dated May 11, 2018.) The Court instructed the Board to issue the standard make-whole remedy and to do so promptly. *LJEB IV*, slip op. at p. 20. On remand, the Board should comply with the Court's instruction and issue an order that stays within its discretion. *See in re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (explaining law of the case); *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (applying *Sanford Fork* to administrative agency); *Carrillo-Jaime v. Holder*, 533 F. App'x 760, 762 (9th Cir. 2013) (same).

Below the Union discusses the nature of the standard make-whole remedy, why the remedy is consistent with the Act, why the Board should not change the standard remedy with this case, and why the Board should award the standard interest in this case.

1. The standard make-whole remedy for dues checkoff has remained largely unchanged for decades.

"It is well established that the Board requires an employer to reimburse the union for dues-checkoff payments that it failed to make under the collective-bargaining agreement where employees have individually signed valid authorizations for the employer to deduct union dues from their wages." *Plymouth Court*, 341 N.L.R.B. 363, 363 (2004); *see also Ogle Protection Serv.*, 183 N.L.R.B. 682, 682-83 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971) (same); *California Blowpipe & Steel*, 218 N.L.R.B. 736, 754 (1975) (same), *enfd.* 543 F.2d 416 (D.C. Cir. 1976);

Sommerville Constr., 327 N.L.R.B. 514, 514 (1999) (same), *enfd.* 206 F.3d 752, 753 (7th Cir. 2000); *Gadsden Tool,* 340 N.L.R.B. at 31 (same), *enfd.* 116 F. App'x 245 (11th Cir. 2004). As the Board's General Counsel stated upon the third remand, "The Board has consistently required an employer to reimburse a union for any dues it failed to withhold and transmit to that union with interest where the employer has unlawfully failed to checkoff dues and where the employees have individually signed dues checkoff authorization." (NLRB's Position Statement on the third remand, dated July 9, 2012, p. 5.) Although determining the exact amounts is a task for compliance proceedings, the Union notes that it has maintained records and will be able to show that Hacienda failed to pay, in 1995 dollars, $19,626.00 in authorized dues while Sahara failed to pay $54,363.00 in authorized dues.

The second part of the Board's standard make-whole relief goes to workers who incurred expenses to make their dues payments on their own. *See, e.g., Enterprise Leasing Co. of Fla.*, 362 N.L.R.B. No. 135, slip op. at 1 n.1 (2015), *enfd.* 831 F.3d 534 (D.C. Cir. 2016); *Sommerville Constr.*, 327 NLRB 514 n. 2 (1999); *Mitchell & Slavens*, 310 N.L.R.B. No. 100, slip. op. at 1 (1993); *Kraft Plumbing & Heating*, 252 N.L.R.B. 891, 891 n.2 (1980), *aff'd* 661 F.2d 940 (9th Cir. 1981). To restore the workers to the *status quo ante*, the Board should order the Respondents to reimburse workers for any expenses they incurred attempting to remit dues such as mileage, postage, etc. Employees should have the opportunity to prove these expenses at the compliance hearing.

Finally, the Board is free, in its discretion, to order a notice posting if it finds it appropriate to do so. Notice postings are a standard Board remedy for most cases. The Ninth Circuit has made clear, however, that a notice posting by itself is not a sufficient remedy. *See LJEB IV*, slip op. at 5. The Union does not advocate this remedy, however, because it would be

a meaningless gesture for the reasons explained in the Union's briefs to the Ninth Circuit on the fourth petition for review.

2. Make-whole relief is consistent with the purposes of the Act.

One of fundamental purposes of the Board's remedial orders is "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 265 (1969); *accord Franks v. Bowman Transp. Co.,* 424 U.S. 747, 769 (1976) ("The task of the NLRB in applying § 10(c) is 'to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'").

Dues reimbursement "is intended to make the Union whole for the consequences of the Respondent's unfair labor practice." *Enterprise Leasing*, 362 N.L.R.B. at 1 n.1. Reimbursement, itself, is remedial and not punitive. *Id.* Notably, because "[t]he loss of dues to the Union has resulted from the Respondent's unfair labor practices . . ., the financial responsibility for making the Union whole for dues it would have received but for Respondent's unlawful conduct rests entirely on the Respondent and not the employees." *West Coast Cintas Corp.*, 291 N.L.R.B. 152, 156 & n.6 (1988).

3. The Board should not use this case to change the rules for the standard remedy; Archon cannot recoup against workers.

The Board should issue a remedial order which precludes Respondents from recouping from their employees any dues amounts they are ordered to reimburse the Local Joint Executive Board of Las Vegas, Culinary Workers' Union, Local 226, and Bartenders' Union, Local 165 (the Union). Not only would such recoupment be practically impossible given that the workers have not been on the Hotels' payroll for more than twenty years, doing otherwise would not meet the criteria for the Ninth Circuit's order of "the standard remedy of make-whole relief." *LJEB IV*, slip op. at p. 20.

The Board has repeatedly made clear that the "financial responsibility for making the Union whole for dues it would have received but for Respondent's unlawful conduct rests entirely on the Respondent and not the employees." *West Coast Cintas Corp.*, 291 N.L.R.B. at 156 n.6 ; *accord Texaco, Inc.*, 264 N.L.R.B. 1132, 1146 (1982), *enfd.* 722 F.2d 1226 (5th Cir. 1984); *Gadsden Tool, Inc.*, 340 N.L.R.B. 29, 29, fn. 1, 34 (2003), *enfd. mem.* 116 F. App'x. 245 (11th Cir. 2004). The Board itself has never ruled otherwise.

Because the Board has never stated that employers could recoup unpaid dues reimbursement from employees, and because the Ninth Circuit ordered the Board to issue the "standard remedy" promptly, *LJEB IV*, slip op. at p. 20, this is not the case for the Board to change any rules even if it were so inclined.

4. Compound interest applies to this case.

The Board has adopted daily compounded interest as the standard form of interest on awards of make-whole relief. *See Kentucky River Medical Ctr.*, 356 N.L.R.B. 6, 9 (2010); *see also, e.g., Emerald Green Bldg. Servs.*, LLC, 364 N.L.R.B. No. 109 (ordering daily compounded interest on dues-checkoff reimbursements). At the Ninth Circuit ruled already in this case:

> There is no force to the argument, urged here, that compound interest wrongly penalizes respondents for the sometimes protracted nature of unfair labor practice proceedings. The Supreme Court has rejected a similar argument with respect to backpay awards generally, recognizing that delay injures backpay claimants and that the Board is "not required to place the consequences of its own delay . . . upon wronged employees to the benefit of wrongdoing employers." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, supra, 396 U.S. at 265. Moreover, as the Federal courts have observed, during the period before a backpay award becomes effective, the respondent enjoys "an interest-free loan for as long as it can delay paying out back wages." *Clarke v. Frank*, 960 F.2d 1146, 1154 (2d Cir. 1992).

LJEB IV, slip op. at p. 13 (quoting *Kentucky River Medical Ctr.*, 356 N.L.R.B. at 9). The Court further "decline[d] to toll the accrual period." *Id.* This continues to be the law of the case for this matter.

Moreover, according to the Board, interest is a fundamental part of "the remedial policies of the National Labor Relations Act." *Kentucky River Medical Ctr.*, 356 N.L.R.B. at 6. Asking the wronged party to bear the weight of the delay, in favor of the wrongdoer, is not reasonable. *See J.H. Rutter-Rex Mfg.*, 396 U.S. at 265 ("Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer."). The Supreme Court has repeatedly held that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 262 (citing *NLRB v. Electric Cleaner Co.*, 315 U.S. 685, 698 (1942); *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962)). The Supreme Court's reasoning applies equally to a wronged union. Moreover, the dues plus interest remedy to the Union benefits the employees because it helps pay for the union's work.

C. Archon is the Parent Company.

Archon Corporation is the admitted parent company of the Hotels. (Intervenor's Brief on Fourth Appeal, dated June 9, 2017, p. 27.) After *Hacienda IV*, Archon conceded that the Board's remedial order would apply to itself as the parent corporation of the Hotels. (*Id.* ("The injunctive relief ordered by the Board will govern Archon's operations going forward and therefore will have the desired deterrent effect.")) The Union agrees that Archon is liable for the underlying violations of the Act and liable under any remedial order that the Board may issue. Any argument to the contrary has been waived.

D. The Board Should Order Make-Whole Relief Promptly.

When ordering the third remand, the Ninth Circuit announced that "the parties cannot be expected to wait any longer." *LJEB III*, 657 F.3d at 876. The case has now dragged on for another seven years. In its most recent opinion, the Court ruled that "[t]he Union's entitlement to

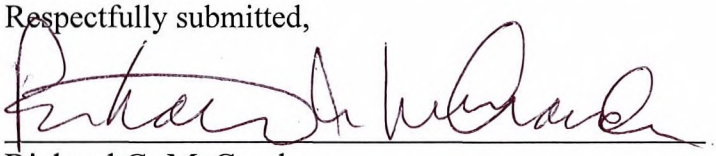
effective relief for an unfair labor practice that occurred more than twenty-two years ago cannot be delayed any further." *LJEB IV*, slip op. at 16. The Court "urge[d] the Board to move swiftly on remand to award the standard remedy of make-whole relief." Slip op. at p. 20. Any further delay will violate the Court's mandate and further injure all the parties before the Board.

E. Any Factual Issues Regarding Money Calculations Should be Left to the Compliance Stage.

The Court instructed the Board that "[a]ny disputes that arise concerning the calculation or amount of relief should be resolved promptly in compliance proceedings." *LJEB IV*, slip op. at 20, n.8. The compliance phase is the appropriate time for the NLRB to make the "determination of specific liabilities . . . ." *NLRB v. Deena Artware, Inc.*, 361 U.S.398, 411 (1960) (Frankfurter, J., concurring) (discussing backpay). In compliance, the task will be to calculate (1) the amounts of dues that Respondents failed to deduct and pay to the Charging Party for as long as Respondents employed the Union's bargaining-unit members, (2) which employees, if any, are entitled to reimbursement, and (3) the expenses incurred by employees in paying their dues without the aid of checkoff. *See Cent. Washington Hosp.*, 303 N.L.R.B. 404, 416 (1991) ("Determination of the amounts due, if any, is left to the compliance stage this proceeding."); *Auto Workers Local 376 (Emhart Indus.)*, 278 N.L.R.B. 285, 286 (1986) ("Which, if any, employees are entitled to such reimbursement shall be established in a compliance proceeding.").

DATED: June 8, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Marcie Boyle, hereby certify that a copy of **Position Statement of Charging Party Local Joint Executive Board, Culinary Workers Union, Local 226 and Bartenders Union Local 165** was filed by e-filing with the Board and served in the manner and addresses described below:

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